COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-879

GUARDIANSHIP OF M.M.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following an evidentiary hearing held over two days, a judge of the Probate and Family Court found M.M. incompetent and entered (1) an order approving a treatment plan including the antipsychotic drug Thorazine, and (2) a decree appointing a guardian to make medical decisions on M.M.'s behalf. M.M. appeals, arguing error in the judge's finding of incompetence and in her conclusion that M.M.'s substituted judgment would be to consent to treatment with Thorazine. We affirm.

Background. We summarize the judge's subsidiary findings, which we accept because they are supported by the record. See Guardianship of Brandon, 424 Mass. 482, 488 (1997). These proceedings commenced on February 15, 2017, when Vibra Hospital of Western Massachusetts (Vibra) petitioned for appointment of a guardian for M.M., with authority to consent to treatment with antipsychotic medication. M.M., then thirty years old, had been hospitalized since October 2016, in connection with criminal

charges involving malicious destruction of property and violation of an abuse prevention order.

In 2010, M.M. was first diagnosed with a mental illness. He has been diagnosed with schizoaffective disorder, bipolar type, and has been hospitalized ten times. M.M. stopped taking his antipsychotic medication every time he was out of the hospital, and has quickly decompensated without medication. His decompensation has been characterized by giggling followed by talking to himself, sleeplessness, not eating, and increasingly agitated behavior. The judge found M.M. "has a pattern of discontinuing medications in the community, resulting in admissions to psychiatric units and, in some instances, criminal charges and restraining orders." M.M. does not, however, like taking certain medications, including Thorazine, because they make him tired and because he does not believe he is mentally ill.

M.M. was being treated with 400 milligrams per day of the antipsychotic drug Seroquel when he was admitted at Vibra. However, he was still exhibiting psychotic symptoms, so his treating psychiatrist increased that dose to 600 milligrams per day. When the increased dosage did not adequately address M.M.'s symptoms, the psychiatrist introduced Thorazine and Depakote. M.M.'s condition improved on this regimen, although he did have some residual psychotic symptoms. M.M. refused to

increase the amount of any medications or consider alternatives to address the residual symptoms. His psychiatrist did not observe M.M. experiencing any side effects while on Thorazine.

In June 2017, the court did not renew a treatment order requiring M.M. to take Seroquel, Thorazine, and Depakote. M.M. immediately stopped taking Thorazine and Depakote but continued to take Seroquel. M.M.'s social worker did not observe any change in M.M.'s sleeping patterns after he stopped taking Thorazine and Depakote. However, M.M.'s psychotic symptoms increased. He became more delusional and irritable. M.M. stated that he planned to get a job and live with a friend upon discharge from Vibra. M.M. testified that he did not plan to utilize any community services other than visiting an outpatient facility that does not provide medication oversight. M.M. cannot live with his mother, as he has in the past, because the mother's neighbor has a restraining order against him. M.M.'s mother is unable to supervise M.M.'s medication as she has in the past.

After carefully considering the evidence, the judge found that M.M. was incapable of making informed decisions about his medical care because he was unable to understand the nature or extent of his mental illness or the risks and benefits of treatment. The judge further found that: treatment with antipsychotic medication was necessary to address the symptoms

of M.M.'s mental illness; M.M. would most likely stop taking those medications outside of the hospital if left to his own devices, placing him at very substantial risk of harm; and, therefore, M.M. required a guardian to make decisions regarding his personal affairs, including medical and psychiatric decision-making. "After consideration of the evidence, using a subjective test as to what [M.M.] would choose if competent, and taking into account the substituted judgment factors enumerated in Rogers v. Commissioner and its progeny,"[1] the judge concluded that M.M.'s "substituted judgment would be to accept treatment with antipsychotic medication," and approved a treatment plan including Seroquel and Thorazine.

Discussion. M.M. argues that the judge erred in finding him incompetent because (1) he continued taking Seroquel when he was not required to, and (2) negative side effects are a rational reason for not wanting to take Thorazine. The judge further erred, according to M.M., when she found that M.M.'s substituted judgment would be to consent to treatment including Thorazine. M.M. claims that the judge completely ignored his testimony that he prefers not to take that drug because of the side effects and that he would rather take only Seroquel. We see no error.

[1] See Rogers v. Commissioner of the Dep't of Mental Health, 390 Mass. 489, 505-506 (1983).

An incompetent person is one with "a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care . . . ." G. L. c. 190B, § 5-101 (9). In the context of medical treatment, incompetent means the "patient lacks the capacity to make treatment decisions." Cohen v. Bolduc, 435 Mass. 608, 618 n.25 (2002), quoting Rogers v. Commissioner of the Dep't of Mental Health, 390 Mass. 489, 497 (1983). "An informed decision about medical treatment 'requires knowledge of the available [treatment] options and the risks attendant on each.'" Guardianship of Roe, 411 Mass. 666, 670 (1992), quoting Harnish v. Children's Hosp. Med. Ctr., 387 Mass. 152, 154 (1982).

The record demonstrates that M.M. is aware of the availability of antipsychotic drugs, including Thorazine, and their side effects. However, M.M. "does not appreciate the risks associated with refusing" treatment with them. Roe, 411 Mass. at 671. The judge had a first-hand view of M.M.'s ability to understand and appreciate the nature of his mental illness and the proposed treatments, and her assessment of his testimony is entitled to deference. Guardianship of Jackson, 61 Mass. App. Ct. 768, 774 (2004). We see no error in the judge's conclusion that M.M. lacks insight into his mental illness or an

understanding of the need for treatment, such that he is currently incapable of making decisions regarding his medical treatment. See Roe, 411 Mass. at 670 (determination of incompetence "must be based on the mentally ill person's current incapacity to make such decisions").

After determinations of incompetency have been made, judges substituting their judgment for that of an incompetent person must weigh the person's expressed preferences, the person's religious convictions and their relation to refusal of treatment, the impact on the person's family, the probability of adverse side effects, and the prognosis with and without treatment. Guardianship of Doe, 411 Mass. 512, 519 (1992). The judge in this case considered M.M.'s expressed preference not to take Thorazine, and she weighed that against his wishes not to be hospitalized, to live independently, and to have a job. None of these things have proven possible without Thorazine. M.M.'s desire to take Seroquel alone is "not based upon a reasoned assessment of his condition or treatment needs" where Seroquel has failed to address all of M.M.'s psychotic symptoms. Roe, 411 Mass. at 674. The judge found that M.M. has no religious convictions that would prevent him from taking Thorazine, that his family supports his treatment with that drug, that his prognosis without treatment is poor, and that M.M. "should eventually be able to discharge from the hospital to the

community" if he continues treatment with Thorazine. She also carefully outlined the possible side effects of Thorazine and found that M.M. does not exhibit them.

In short, the judge carefully considered the evidence, entered specific findings on each factor, and then balanced the various interests, as she was required to do. See Doe, 411 Mass. at 524. We see no error in her decision, which represents the "careful work and reflection" that is required in these types of proceedings. Id.

The October 19, 2017, order and decree are affirmed.

So ordered.

By the Court (Blake, Henry & McDonough, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: October 30, 2019.

[2] The panelists are listed in order of seniority.